MOTION TO DISMISS APPEAL

FORMAL MOTION

Appellee in the above entitled case moves the United States Supreme Court to dismiss the appeal on any or all of the following grounds:

1. The appeal was not taken within the time provided by law;

2. The appeal does not present a substantial Federal question;

3. Any possible Federal question sought to be reviewed was not timely or properly raised or expressly passed on in the court below;

4. The judgment appealed from rests on an adequate non-Federal basis;

5. The appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or to rules.

THE OPINIONS BELOW

Copies of the opinions, decrees, and orders of the lower courts are included in the Appendix of Appellant's Statement as to Jurisdiction. For purposes of the Appellee's argument herein on the jurisdiction question a copy of Appellant's Exceptions to the Decree Nisi of the Quarter Sessions Court is included as Appendix A.

The record shows that by Order entered May 24, 1955, the Supreme Court of Pennsylvania refused Appellant's appeal from the Superior Court. On June 16, 1955, the Appellant petitioned the said Court to reconsider. The petition was refused by order of September 29, 1955. No opinions were filed with these orders.

The time allowed for appeals to the Supreme Court of the United States is prescribed by 28 U.S.C. Section 2101. In this case the appeal must be taken within ninety days after the entry of judgment below. See Appendix B herein.

STATEMENT OF THE CASE

In Delaware County, Marple Township, Springfield Township, Nether Providence Township and Upper Providence Township abut on the reservoir of the Philadelphia Suburban Water Company on Crum Creek. The boundaries of each township in effect form a V or pie-shaped wedge and when the four are viewed on a map of Delaware County their boundaries form a rough X with the reservoir in the center. Marple lies to the north, Springfield to the east, Nether Providence to the south and Upper Providence to the west.

Crum Creek is that leg of the X running from the northwest to the southeast. Trout Run is a tributary of Crum Creek and is entirely within Marple Township. The Run flows practically due south into Crum Creek. There is another small stream that is tributary to Trout Run flowing westwardly into it and lapping the edge of Appellant's subdivision. The drainage of Appellant's property is entirely into this water-shed.

The Central Delaware County Sewer Authority owns and operates a sewage treatment plant and a trunk line sewer main extending from the treatment plant northwardly about eight miles to a point within about four miles from Appellant's land. This trunk line, with the approval of the State Sanitary Water Board, was designed to service the entire area contributory to the trunk line, including the area and the property now in question.

Statement of the Case

The trunk line sewer extension necessary to serve Appellant's subdivision will extend from the present northerly terminus of said trunk line in an up-stream direction, an overall distance of about four miles, where it will be connected with the local sewer lines constructed within Appellant's subdivision and other adjoining lands. This trunk line extension has not been laid, but it has been found as a fact that it is in a definite and active planning stage and every continuous effort is being made to make it a reality within a reasonable time. Under the Marple Township regulations building areas can be subdivided into lots of twelve thousand square feet or less if the subdivider provides for connection to a municipal sewer or installs local sanitary sewer lines to be joined later on to the trunk lines as and when such trunk lines become available.

In the instant case Appellant's application for approval of his subdivision plan was approved upon condition that if he chose immediately to subdivide and develop the tract into twelve thousand foot lots he could do so if he installed the necessary local sanitary sewer lines as part of the development. Provision was made to permit immediate occupancy of houses to be constructed within the development by permitting the temporary use of individual cesspool and septic tanks pending connection of the sewer lines to trunk lines to be constructed. Appellant's plan for the subdivision calls for lots of twelve thousand square feet area.

In view of the rapidly increasing population and development of the Township, its proximity and drainage into the water supply and the condition of the soil it is

inevitable that an overall sewage system rather than individual on-site disposal units be established. To allow the construction of streets in the area without the laying of local sewer pipes under these circumstances would be extremely short sighted and inadequate Township planning. It would subject the public to the additional expense and inconvenience that would be occasioned by tearing up the streets to put in the lines and then having to reconstruct the streets when all this can be avoided by requiring the local sewer lines to be laid with the street in the first instance.

ARGUMENT ON THE JURISDICTIONAL QUESTION

It is submitted that the appellant has not taken this appeal within the time set by law and furthermore that this case is not within the purview of the Statute 28 U.S. C.A. Section 1257, nor taken in accordance with Rule 16 of the United States Supreme Court.

I. The appeal to the United States Supreme Court was not taken within the time fixed by law for the taking of an appeal from the state court's decision.

The docket entries show that the State Supreme Court refused the appeal from the Superior Court by Order entered May 24, 1955. Rules 69 and 73 of the Supreme Court of Pennsylvania, as set forth in Appendix C and D herein, provide that a petition for reargument must be filed before the record is returned to the lower court and that the record will be returned after ten days following the final Order unless such a petition is filed. In the instant case the appellant never filed a petition for reargument and a docket entry shows the record remitted on June 6, 1955.

On June 16, 1955, i.e. twenty-three days after the Order, the appellant filed a petition to reconsider. The Rules of the Supreme Court of Pennsylvania do not provide for such a petition, but even if it were considered in the

nature of a petition for reargument it would not stand in the face of the obvious defect that it was not filed in time. Any other conclusion would preclude any order of the Supreme Court of Pennsylvania from becoming final until such a petition to reconsider had been filed, and this is clearly not in accord with Rule 73. The Supreme Court of Pennsylvania denied the petition on September 29, 1955, but the final order refusing the appeal was entered May 24, 1955. The Notice of Appeal to the Supreme Court of the United States was filed December 21, 1955, well after the expiration of the ninety days limit set by law.

II. The decision appealed from did not draw in question the validity of a statute of the state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The appeal does not present a substantial Federal question and any conceivable Federal question sought to be reviewed here was not timely or properly raised or expressly passed on in the court below.

The United States Supreme Court has set forth certain requirements of particularity which must be met in framing the Federal question. In *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 the court stated:

> "The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right".

Nor will a mere reference to the Constitution of the United States or the Constitution and laws of the United States or due process of law sustain the jurisdiction of the United States Supreme Court. *Herndon v. Georgia,* 295 U.S. 441, 442-3; *Oxley Stave Co. v. Butler County,* 166 U.S. 648; *Bowe v. Scott,* 233 U.S. 658, 664-5.

Furthermore, it is well settled in this court that it must be made to appear that some provision of the Federal as distinguished from the State Constitution was relied upon and that such provision must be set forth. *New York Central & H. R. Co. v. New York,* 186 U.S. 269, 273.

The Appellant's Petition and Appeal From Refusal to Approve Subdivision Plan addressed to the Court of Quarter Sessions of the Peace and a part of the record in this case does not fulfill the requirements of the United States Supreme Court as set out in the above cases. Nowhere does the Petition even refer to the United States Constitution, any language of the Constitution or any phrase from it. The adjudication, the Decree Nisi, the Order, the Appellant's Exceptions, the Opinion and the Final Decree—all papers of record and certified to the United States Supreme Court in this case—make no reference to any Federal question, or any portion of the Constitution of the United States; nor do they draw in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States. Thus, the final decree of the Court of Quarter Sessions and the proceedings therein from which this opinion is taken raise no Federal question and pass on no Federal question.

The first time the Appellant ever alleges or refers to any constitutional or Federal question is in his appeal to

the Superior Court of Pennsylvania. See pages 6 and 7 of Appellant's Statement as to Jurisdiction. In the Pennsylvania court system questions and objections not raised in the court below will not be considered on appeal. An appellate court in Pennsylvania does not raise questions de novo, but reviews those tried and considered in the court below. An appellate court will refuse to consider questions which were not raised by the pleading or at the trial of the cause or which were not urged or argued in the court below. The Pennsylvania cases enunciating these principles of law are legion. Some of them are cited here:

Levenite v. Lancaster, 215 Pa. 576, 74 A. 782;

Woldow v. Dever, 374 Pa. 370, 97 A. 2d 777;

McLaughlin v. Monaghan, 290 Pa. 74, 138 A. 79;

Kascak v. United Societies, 117 Pa. Super. Ct. 423, 177 A. 338;

Spitzer v. Philadelphia Transp. Co., 348 Pa. 548, 36 A. 2d 503;

Grisbord v. Philadelphia, 148 Pa. Super. Ct. 91, 24 A. 2d 646;

Muse-Art Corp. v. Philadelphia, 373 Pa. 329, 95 A. 2d 542;

Montgomery Co. B. Assn. v. Rinalducci, 329 Pa. 296, 197 A. 94;

Middletown Boro. v. Pa. P.U.C., 143 Pa. Super. Ct. 444, 17 A. 2d 904.

The United States Supreme Court has ruled that the time and place to raise the Federal question in the State Court is determined by State practice. *Hulbert v. Chicago,* 202 U.S. 275; *Edelman v. California,* 344 U.S. 357. Where

the Federal question is initially raised in a petition or assignment of error filed in the highest court of the State which refuses to consider any issue not presented to the trial court the jurisdiction of the United States Supreme Court cannot attach. *Bailey v. Anderson,* 326 U.S. 203, 206-7; *Radio Station WOW v. Johnson,* 326 U.S. 120, 128; *Herndon v. Georgia,* 295 U.S. 441, 443. Moreover, briefs and oral arguments before State courts are not ordinarily part of the record filed with the Supreme Court of the United States and cannot be used to establish that a Federal question was raised. *Live Oak Ass'n. v. Railroad Commission,* 269 U.S. 354, 357-8; *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54. The mere citation in the State Court's opinion of the United States Supreme Court cases is not enough to establish jurisdiction. *Osborne v. Clarke,* 204 U.S. 565, 567-8. Review in the United States Supreme Court is limited to the specific questions which were properly raised in the state courts. *Whitney v. California,* 274 U.S. 357, 362-3; *Adler v. Board of Education,* 342 U.S. 485, 496. An appellant cannot raise a Federal issue in the United States Supreme Court when it was not raised or decided below, even though he could have raised it below. *Dewey v. Des Moines,* 173 U.S. 193, 198.

Since the record in the Court of Quarter Sessions of the Peace is clearly devoid of the mention or raising of any specific federal question or language from the United States Constitution, the above decisions of the Supreme Court of the United States establish that no Federal question was involved in the decision from which this appeal is taken.

In his Statement as to Jurisdiction, the Appellant cites several cases as sustaining the jurisdiction of this

Court on his appeal. A reading of the opinions in two of them, *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, and *Ex parte Williams*, 277 U.S. 267, does not disclose that the issue of properly raising the Federal question appeared. In another, *Poulos v. New Hampshire*, 345 U.S. 395, the appellant had alleged in his complaint that his freedom of speech, assembly and worship and his rights under the Bill of Rights and the First and Fourteenth Amendments of the United States Constitution had been violated. In still another, *Atchison, Topeka & Santa Fe Ry. Co. v. P.U.C. of California*, 346 U.S. 346, due process and interstate commerce questions under the United States Constitution had been squarely raised in the courts below. Thus, these cases cannot help the Appellant in showing that he has raised a Federal question in this case, since he has not done what was done by the appellants in the cases he cites.

In no way is this motion to be considered an admission that Appellant's position can be sustained on the merits. Although much of Appellant's Statement as to Jurisdiction involves argument directed to the merits of the case, this Motion is not concerned with such an argument because the jurisdictional question is the only one sought to be placed before the United States Supreme Court at this stage of the proceedings.

CONCLUSION

It is respectfully submitted that the Appellant presents no case where there is drawn in question the validity

of any State statute on the ground of its being repugnant to the Constitution of the United States and that the decree and proceedings in the court below raise no Federal question and pass on no Federal question. Furthermore the appeal was not taken within the time fixed by law. Therefore, the Appellant's appeal to the United States Supreme Court should be dismissed and the decree of the lower court be affirmed.

Respectfully submitted,

JOSEPH D. CALHOUN,
218 West Front Street,
Media, Pennsylvania,
Attorney for Appellee.

Of Counsel:
LINDENMUTH & CLASS,
106 County Building,
Media, Pennsylvania.

APPENDIX A

In The Court of Quarter Sessions, etc., of Delaware County, Penna.

APPELLANT'S EXCEPTIONS

To the Honorable Judges of the said Court:

The appellant, SAXONY CONSTRUCTION COMPANY, makes the following exceptions to the Adjudication, Findings of Fact, Conclusions of Law, Discussion and Decree Nisi in the above captioned case:

1. The appellant excepts to the following Findings of Fact contained in the Adjudication dated December 17, 1953.

5. Owner also owns an adjoining area which can be subdivided into five additional lots.

21. The construction of a sanitary sewer from the present interceptor sewer terminus to Section "K" would require approximately from 120 to 140 days.

22. The present Central Delaware County Authority Sewage treatment plan, is designed to have a capacity to accommodate a 70,000 population.

23. The said interceptor sewer was designed and is sufficiently large to accommodate and meet the sanitary sewer requirements of the up stream areas.

24. Preliminary engineering and related studies for the extension of the said interceptor sewer are now being made and have progressed without delay.

31. If such installation is after the streets are constructed, the cost will be at least $1½ per foot of frontage additional, aside from the then damage to paved cartways.

32. Owner has graded a large portion of Section "K" to solid rock, pushing the earth to other areas within Section "K" to various depths up to six feet.

33. Before being disturbed by grading the geological structure of the soil consisted of a shallow layer of top soil, several feet of decomposed mica schist, below which is undecomposed mica schist, which is hard rock, massive, tight and very deep.

34. Test borings in Section "K" show that the layer of decomposed mica schist is very porous and that sewage from cesspools would descend rapidly to the top of the undecomposed mica schist, which is impervious; that the soil bacteria would have little chance to work on the sewage and that it would run along the top of the undecomposed mica schist in practically a pure state and would be discharged into Trout Run in a few hours.

37. The area has developed so rapidly that it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact that trunk lines are not yet beyond the planning stage.

38. Under all of the evidence, it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within a development prior to the approval of a subdivision plan.

2. The appellant takes exception to the failure of the Court to make the following Findings of Fact.

13. The Township can make no commitment to construct the sewer trunk lines which would serve Section "K" (N.T. 17, 180, 186).

14. Marple Township is not one of the several municipalities which constitutes the Central Delaware County Sewer Authority (N.T. 104).

17. Approximately 17,300 feet of such pipe is required in Marple Township (N.T. 106).

18. Central Delaware County Sewer Authority has never undertaken to construct sub-trunk lines which are exclusively within one township (N.T. 107).

19. The pipe from Crum Creek at Trout Run and along Trout Run to Section "K" is to be a sub-trunk line approximately 12,000 feet long entirely within Marple Township (N.T. 105, 106, 107).

20. Marple Township has not yet made a detail design of the pipe lines which might be placed in Trout Run (N.T. 107).

21. The Trout Run pipe would probably be 12 to 18 inches in diameter (N.T. 107).

22. Marple Township has made no specific plan of courses or distances for the construction of a Trout Run sewer pipe line (N.T. 108).

23. Central Delaware County Sewer Authority has plans only to extend the trunk line 5,300 feet to the Springfield Township line and no starting date or commitments have been made by the authority (N.T. 108, 109).

26. Marple Township has never made an on-the-ground survey for a pipe line along Trout Run (N.T. 111).

27. Marple Township is presently engaged in a One hundred eighty thousand and 00/100 ($180,000.00) dollar sewer construction job in the Edgewood Park section of the Township (N.T. 114).

28. It would take between 90 and 140 days to construct 12,000 feet of pipe line to Crum Creek after all preliminary engineering, ordinance, financing and right of way work was completed and about the same length of time to lay pipe from Trout Run to the present terminus of the Authority's pipe.

29. The Central Delaware County Sewer Authority spent One hundred sixty-five thousand and 00/100 ($165,000.00) dollars of its own money and one million two hundred thousand and 00/100 ($1,200,000.00) dollars of U. S. Government funds under W. P. A. Authority to construct ten miles of trunk lines during the depression (N.T. 123).

30. Neither Marple Township nor the Central Delaware County Sewer Authority have any expectation of such a government subsidy for construction of extensions of existing sewer lines (N.T. 123, 124).

31. After a period of five months unusually heavy rain (approximately 30 inches), test borings

were made in Section "K" and it was found that the soil is decomposed Wissahickon mica schist and that the percolation quality of the soil was excellent (N.T. pp. 24-30, 51).

32. Cesspools and septic tanks can work well in the soil contained in Section "K", both from the standpoint of disposal and purification (N.T. 33, 45).

35. The average size cesspool and septic tank can adequately handle the needs of a home built in Section "K" (N.T. 50).

36. There is no danger to the water supply in Crum Creek if cesspools and septic tanks in Section "K" are properly constructed (N.T. 58, 59, 74).

37. The sewage from cesspools in Section "K" will not pollute Trout Run or Crum Creek (N.T. 59, 60, 74).

38. The Delaware County Planning Commission requires a minimum area of 10,000 square feet in lots for which cesspools are intended—this is one-half of the requirement of Marple Township (N.T. 61).

39. If SAXONY CONSTRUCTION COMPANY is compelled to construct a blind sewer in addition to cesspools and septic tanks, the Veterans Administration would not include the cost of the blind sewer in the appraisal for mortgage purposes (N.T. 80, 81).

43. Under all of the evidence Marple Township has not shown that sewer connections can be made available to Section "K" within a reasonable time.

44. Under all of the evidence it is unreasonable, arbitrary and capricious for Marple Township to demand construction of a blind sewer in Section "K" at this time.

3. The appellant excepts to the following Conclusions of Law contained in the Adjudication of December 17, 1953.

1. Because of the rapid development of the area in which the appellant's property is situated, it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact the trunk lines are not yet beyond the planning stage.

2. Under all the evidence it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within the development prior to the approval of a subdivision plan.

3. The appeal should be dismissed at the cost of the appellant.

4. The appellant takes exception to the failure of the Court to make the following Conclusions of Law.

1. The action of the Supervisors of Marple Township was arbitrary, capricious, unreasonable and without legal authority.

2. Marple Township must approve the subdivision plan for Section "K" unconditionally, i.e., without requiring construction of sanitary sewers.

5. The appellant excepts to the Decree Nisi contained in the Adjudication of December 17, 1953.

> And now, to wit: December 17th, A.D. 1953, upon consideration of the foregoing case, it is ordered, adjudged and decreed that the appeal of Saxony Construction Company from the refusal of the Board of Supervisors of Marple Township to approve a certain subdivision plan be and it is hereby dismissed.
>
> The Appellant shall pay the costs.

6. The appellant takes exception to the ruling of the Court which prohibited the appellant from introducing testimony on the question of cost of construction of the sewer trunk lines and laterals.

7. The appellant reserves the right to file additional exceptions at the time of preparation of its brief.

Respectfully submitted,
JOHN R. GRAHAM,
Attorney for the Appellant.

APPENDIX B

U. S. Statutes 28 U.S.C.A. Section 2101 (c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX C

RULES OF THE SUPREME COURT OF PENNSYLVANIA

RULE 69. Petitions for reargument must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; and must specify particularly the point supposed to have been overlooked or misapprehended by the court (with a proper reference to the portions of the original Brief or Record relied on to establish the fact alleged) the reasons for a rehearing, and arguments in favor thereof. Attached thereto shall be a copy of all the opinions filed in the case; and, accompanying it, a copy of all the Briefs used in the argument of the case.

APPENDIX D

RULES OF THE SUPREME COURT OF PENNSYLVANIA

RULE 73. Unless otherwise ordered, the record in every case shall be remitted to the court from which the appeal was taken, at the expiration of ten days from the final order, judgment or decree of this court, unless there is pending a motion for reargument, or other motion affecting the order, judgment or decree, or a petition for an appeal to the Supreme Court of the United States, in which cases the record shall be held to await the disposition thereof; after which, if the motion or petition be refused, and ten days have elapsed since the entry of the final order, judgment or decree, the record shall be remitted forthwith to the court below.

FILE
MAY 3
HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1955.

No. 694.

SAXONY CONSTRUCTION COMPANY,
Appellant,

v.

BOARD OF SUPERVISORS OF MARPLE TOWNSHIP,
Appellee.

Brief in Opposition to Motion to Dismiss.

Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania.

BRUCE H. GREENFIELD,
WILLIAM A. KELLEY, JR.,
ROBERT K. GREENFIELD,
1315-17 Walnut Street,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

Of Counsel:
CRAWFORD & GRAHAM,
207 County Building,
Media, Pennsylvania,
FOLZ, BARD, KAMSLER, GOODIS & GREENFIELD,
1315-17 Walnut Street,
Philadelphia 7, Pennsylvania.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
1. Appellee's Statement of the Case Demonstrates That the Order Appealed from Is Unreasonable	1
2. The Appeal Was Timely	1
3. The Federal Question Was Raised and Passed Upon by the State Court Within the Meaning of 28 U. S. C. A. 1257(2)	3

TABLE OF CASES CITED.

	Page
American Ry. Express Co. v. Levee, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923)	3
Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947)	5
Bowman v. Loperena, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177 (1940)	2
Brown v. Western Ry., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949)	5
Crowell v. Randell, 35 U. S. 368 (10 Pet.), 9 L. Ed. 458 (1836)	3
Davis v. Wechsler, 263 U. S. 22, 44 S. Ct. 13, 68 L. Ed. 143 (1923)	5
Department of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942)	3
Eureka Lake and Yuba Canal Co. v. Superior Court, 116 U. S. 410, 6 S. Ct. 429, 29 L. Ed. 671 (1886)	3
Fisher v. Perkins, 122 U. S. 522, 7 S. Ct. 1227, 30 L. Ed. 1192 (1897)	2
Gorman v. Washington University, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300 (1942)	2, 3
Kaukuna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004 (1891)	3
Lawrence v. State Tax Commission of Miss., 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1932)	5
Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942)	2
Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760 (1878)	3
National Mutual Building & Loan Association v. Brahan, 193 U. S. 635, 24 S. Ct. 532, 48 L. Ed. 823 (1904)	5
Rogers v. Alabama, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417 (1904)	5
U. S. v. Ellicott, 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535 (1912)	2

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Supreme Court of Pennsylvania:	
Rule 69	2
Rule 73	2
Pennsylvania Act of June 24, 1895, P. L. 212, Section 7(e), 17 Purdon's Pa. Stat., Section 190	4
U. S. Constitution, Fourteenth Amendment	4

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The substance of appellee's motion to dismiss is answered in appellant's statement as to jurisdiction. This brief is to supplement that statement.

1. Appellee's Statement of the Case Demonstrates That the Order Appealed from Is Unreasonable.

In its statement of the case, appellee has urged that although the trunk sewer line has not been laid, "it is in a definite and active stage and every continuous effort is being made to make it a reality within a reasonable time" (Motion to Dismiss, p. 4). This was the argument urged before the Quarter Sessions Court in June, 1953. Three years later there is no trunk sewer line to which appellant can connect, yet appellee is still arguing that effort is being made to complete it within a reasonable time. This passage of time with no appreciable advancement of appellee's plans has conclusively demonstrated that appellant was ordered to construct local sewer facilities in an area having no reasonable prospects for the construction of a trunk sewer within a reasonable time. The consummation of appellee's "plans" are as remote today as they were three years ago at the trial of this case.

2. The Appeal Was Timely.

The circumstances of the appeal to the Supreme Court of Pennsylvania, which are set out in appellant's statement as to jurisdiction, firmly establish that that court retained control of this case until its refusal on September 29, 1955, of appellant's petition to reconsider. That petition had

been filed pursuant to the recommendation of the Chief Justice of the Supreme Court of Pennsylvania. Rules 69 and 73 of the Supreme Court of Pennsylvania are inapplicable. Rule 69 specifies the time within which a petition for reargument must be filed. Such a petition must be filed before the Supreme Court remits the record to the court from which the appeal was taken, which, by Rule 73 is set at ten days after "the final order, judgment or decree of" the Pennsylvania Supreme Court. These provisions concern petitions filed after a perfected appeal has been argued and determined. In this case, although the Pennsylvania Supreme Court considered and dismissed two petitions for the allowance of an appeal, no such appeal was allowed or argued and Rules 69 and 73 have no application. The control of the state supreme court over the proceeding was based upon its constitutional and statutory supervisory powers over all inferior courts of the state. Appellee cannot be heard to argue that a decision of a lower court was final notwithstanding the recommendation of the Chief Justice of the state supreme court for filing a second petition for allowance of appeal, which was considered and passed upon by that court. *U. S. v. Ellicott*, 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535 (1912); *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177 (1940).

It is the burden of a party appealing from a judgment of a state court to show affirmatively that the Supreme Court has jurisdiction. *Gorman v. Washington University*, 316 U. S. 98, 100-101, 62 S. Ct. 962, 963-964, 86 L. Ed. 1300, 1302 (1942); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 651, 62 S. Ct. 857, 859-860, 86 L. Ed. 1090, 1094 (1942). If an otherwise final judgment of an inferior court is susceptible to review in the discretion of a higher state court, there must be an affirmative showing that there was a proper attempt to secure that review, *Fisher v. Perkins*, 122 U. S. 522, 525, 7 S. Ct. 1227, 1229, 30 L. Ed. 1192 (1897), and a similar showing that rights of appeal were taken, or

that none existed, must be made. *Gorman v. Washington University, supra.* Appellant's petitions for appeal to the state supreme court were necessary to demonstrate the exhaustion of all possible state remedies. *American Ry. Express Co. v. Levee,* 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Department of Banking v. Pink,* 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942).

3. The Federal Question Was Raised and Passed Upon by the State Court Within the Meaning of 28 U. S. C. A. 1257(2).

It is not necessary that the federal question appear on the record, nor that the decision be made in direct and positive terms, ipsissimis verbis. It is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to support the judgment. *Crowell v. Randell,* 35 U. S. 368, 398 (10 Pet.), 9 L. Ed. 458, 470 (1836); *Murray v. Charleston,* 96 U. S. 432, 24 L. Ed. 760, 762 (1878); *Eureka Lake and Yuba Canal Co. v. Superior Court,* 116 U. S. 410, 415, 6 S. Ct. 429, 431, 29 L. Ed. 671 (1886).

In *Kaukuna Water Power Co. v. Green Bay & M. Canal Co.,* 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004 (1891), the court said at page 269:

> "This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

Trial of this case in the quarter sessions court upon the question of the "fundamental law controlling the police power"[1] was an adequate presentation of the issue of due process under the federal constitution for purposes of

1. Record, p. 174; Statement of the Case, Appendix B, p. 25.

Pennsylvania practice. That issue would have been treated by the appellate courts of Pennsylvania as sufficiently raised for their review had the appeal not been dismissed on the non-federal ground that statutory limitations upon the scope of this review prevented consideration on the merits. The dismissal of the state appeal upon this ground was entirely unforeseeable under the statutes and cases of Pennsylvania at that time. Pennsylvania superior court cases had previously granted full review of constitutional questions in similar appeals from the quarter sessions courts. In the initial argument on the appeal to the Superior Court, the argument of both parties was concerned with the merits only, including the question whether the appellee's order was repugnant to the Fourteenth Amendment. Later, the parties were notified by that court that it desired to hear reargument "as to the scope of appellate review". After the reargument ordered by the court it dismissed the appeal without consideration of the merits.

Appellant then sought review by the Pennsylvania supreme court, which appeared to be a matter of right under the Pennsylvania Act of June 24, 1895, P. L. 212, Section 7(e), 17 Purdon's Pa. Stat., Section 190. This act provides for appeal to the supreme court from the superior court, as follows:

> "Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court [superior court], there may still be an appeal from its judgment to the supreme court:
>
> First. If the jurisdiction of the superior court is in issue; or
>
> Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or
>
> Third. If the case involves the construction or application of the constitution of Pennsylvania; or

> Fourth. If the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court."

Nevertheless review was refused by the supreme court.

Federal rights are denied as well by a refusal of a state court to decide questions presented as by an erroneous decision of them. *Lawrence v. State Tax Commission of Miss.*, 286 U. S. 276, 282, 52 S. Ct. 556, 558, 76 L. Ed. 1102, 1107 (1932).

Appellant's right of appeal to this Court cannot be denied by the failure of the trial court to phrase the police power question in terms of the federal constitution, particularly where that question has been adequately raised for purposes of state appellate review and where it appears that such review was denied in order to avoid passing upon the federal question. Thus the jurisdiction of this Court is sustained where it appears that the refusal of a state appellate court to pass upon a federal question was an evasion of that issue, and its ruling that the question was not properly raised in the trial court was resorted to merely to give color to its refusal. *Rogers v. Alabama*, 192 U. S. 226, 230-231, 24 S. Ct. 257, 258-259, 48 L. Ed. 417, 418-419 (1904); *National Mutual Building & Loan Association v. Brahan*, 193 U. S. 635, 646, 24 S. Ct. 532, 535, 48 L. Ed. 823, 828 (1904). This is so as to any insubstantial non-federal ground. *Brown v. Western Ry.*, 338 U. S. 294, 298-299, 70 S. Ct. 105, 107-108, 94 L. Ed. 100, 104 (1949); *Davis v. Wechsler*, 263 U. S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143, 145 (1923); *Angel v. Bullington*, 330 U. S. 183, 188, 67 S. Ct. 657, 660, 91 L. Ed. 832, 836 (1947). In *Rogers v. Alabama, supra*, Justice Holmes said at page 230:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

Wherefore, appellant respectfully submits that the motion to dismiss should be denied and the case heard on briefs and oral argument.

Respectfully submitted,

BRUCE H. GREENFIELD,
WILLIAM A. KELLEY, JR.,
ROBERT K. GREENFIELD,
Attorneys for Appellant.

Of Counsel:

CRAWFORD & GRAHAM,
207 County Building,
Media, Pennsylvania,

FOLZ, BARD, KAMSLER, GOODIS & GREENFIELD,
1315-17 Walnut Street,
Philadelphia 7, Pennsylvania.